No. 15-1391

RECORD AND BRIEFS

IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, *et al.*,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT ERIC T. SCHNEIDERMAN

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

A New York statute, General Business Law § 518, provides that a seller may not engage in credit-card surcharging, the practice of collecting additional money in excess of the seller's usual or regular price when a consumer makes a purchase using a credit card. The questions presented are:

1. Whether General Business Law § 518's prohibition on collecting credit-card surcharges regulates a seller's conduct rather than speech and thus does not implicate the First Amendment.

2. If General Business Law § 518 is regarded as a regulation of speech, whether the statute is nonetheless constitutional because it directly and narrowly advances New York's substantial consumer-protection interests in preventing the unique harms posed by credit-card surcharging.

3. Whether the difference between a surcharge and a discount is sufficiently intelligible as a matter of common sense and commercial practice to satisfy due process.

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INTRODUCTION

When you buy a sandwich at a restaurant, the restaurant will give you a bill with the sandwich's price before you decide how you will pay. If you give the restaurant a credit card to complete your purchase, a New York law, N.Y. Gen. Bus. Law (GBL) § 518, restricts what the restaurant may do next: it is forbidden from increasing its regular sandwich price based on your choice to use a credit card. This surcharge prohibition regulates conduct, not speech, because it affects what the restaurant may and may not do when presented with a credit card for payment.

Section 518 is a classic form of price regulation that implicates no First Amendment concerns. Everybody in this litigation agrees that a law may regulate a seller's prices without interfering with any protected speech. New York's surcharge prohibition is such a law: similar to a price ceiling, it forbids only the imposition and collection of additional fees from credit-card users in excess of the regular price, without in any way limiting sellers' ability to use speech to educate customers about the costs of credit-card usage.

Petitioners' contrary position relies on the untenable assertion that a "surcharge" is merely a "label" to describe a differential between the prices paid by credit-card customers and cash customers, and that this differential could just as easily be recharacterized as a "discount." But "surcharge" and "discount" are not just interchangeable labels. Rather, they are mutually exclusive terms that describe whether a seller has moved up or down from its regular price. And common experience confirms

the ease of distinguishing between these practices: if a restaurant adds two dollars to your bill after you hand them a credit card, you are unlikely to mistake this unambiguous surcharge for a discount.

Section 518 thus regulates the economic conduct of increasing prices on account of a customer's credit-card use. Like any other pricing conduct, the imposition of such a surcharge is simply not an act of speech that the First Amendment restricts the government from regulating.

STATEMENT

I. Statutory Background

New York, nine other States, and Puerto Rico have made the policy choice to prohibit sellers from engaging in credit-card surcharging, the practice of collecting an extra fee above the regular price from consumers who make purchases with credit cards.[1] Five of these States also prohibit sellers from collecting surcharges from consumers who use debit cards.[2] Because New York's surcharge prohibition is modeled on, and intended to serve the same policy purposes as, a federal statute that was in effect from 1976 to 1984, a review of that predecessor federal

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[1] Cal. Civ. Code § 1748.1; Colo. Rev. Stat. § 5-2-212; Conn. Gen. Stat. § 42-133ff; Fla. Stat. § 501.0117; Kan. Stat. § 16a-2-403; Me. Rev. Stat. tit. 9-A, § 8-509; Mass. Gen. Laws ch. 140D, § 28A; Okla. Stat. tit. 14A, § 2-211; P.R. Laws tit. 10, § 11; Tex. Fin. Code § 339.001.

[2] Conn. Gen. Stat. § 42-133ff; Kan. Stat. § 16a-2-403; Me. Rev. Stat. tit. 9-A, § 8-509; Okla. Stat. tit. 14A, § 2-211; Tex. Bus. & Comm. Code § 604A.002.

statute is useful to understanding the surcharge provision at issue here.

A. The Prior Federal Prohibition on Credit-Card Surcharging

1. To protect consumers, Congress prohibited sellers from imposing credit-card fees in excess of the regular price

In 1976, Congress enacted a credit-card surcharge ban that prohibited merchants from imposing additional charges above their regular prices when customers pay with a credit card. Pub. L. No. 94-222, § 3(c)(1), 90 Stat. 197, 197 (1976) (codified at 15 U.S.C. § 1666f(a)(2) (1982), *reprinted at* U.S. Br. App. 3a). The statute did not prohibit the separate practice of providing a discount, or reduction from the regular price, for payment by cash, check, credit card, or other means. *See id.* The statute contained a sunset clause, providing that it would expire in three years. *Id.* § 3(c)(2), 90 Stat. at 197.

The federal surcharge prohibition provided that "[n]o seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment" by another means. *Id.* § 3(c)(1), 90 Stat. at 197. The law recognized that surcharging and discounting are distinct practices that differ in their relation to a seller's baseline regular price: the statute defined the term "surcharge" as "any means of increasing the regular price to a cardholder which is not imposed" on other consumers. *Id.* § 3(a), 90 Stat. at 197 (*reprinted at* U.S. App. 2a). It also defined the term "discount" as "a reduction

made from the regular price," and specified that a discount "shall not mean a surcharge." *Id.*

This was not the first time Congress treated credit-card surcharges differently from discounts to protect consumers. In 1968, the Truth-in-Lending Act (TILA), 15 U.S.C. § 1601 et seq., had, inter alia, required merchants to make specified disclosures about finance charges, which are charges imposed as an incident to the extension of credit that are not payable in a comparable cash transaction. *See id.* § 1605. In 1974, Congress amended the statute to exempt certain discounts for payment by cash, check, or other non-credit means (hereinafter, "cash discount") from the definition of a finance charge subject to TILA's disclosure requirements. Fair Credit Billing Act, Pub. L. No. 93-495, § 306, 88 Stat. 1500, 1515 (1974) (codified at 15 U.S.C. § 1666f (1976), *reprinted at* U.S. Br. App. 3a). This exemption made no mention of credit-card surcharges. *Id.* In the same amendment, Congress further protected the provision of cash discounts by prohibiting credit-card issuers from using contractual terms to prevent sellers from offering cash discounts. *Id.* § 306, 88 Stat. at 1515. This protection also did not mention credit-card surcharges. *Id.*

Some groups later began arguing that the 1974 amendment's protections for discounts must also have applied to surcharges, on the theory that surcharges and discounts are two names for the same pricing scheme. *See FCBA Two-Tier Pricing: Hr'g Before the S. Subcomm. on Consumer Affairs* ("*FCBA Senate Hr'g*"), 94th Cong. 3 (1975) (CIS No. 76-S241-3). The Federal Reserve Board interpreted the 1974 amendments as applying only to cash discounts and not to credit-card surcharges but also sought

legislative clarification from Congress. *Id.* at 4. Ultimately, Congress declined to apply the 1974 amendment's protections to credit-card surcharges, and indeed prohibited surcharging altogether by enacting the surcharge ban that was the model for the New York law at issue here. *See* Pub. L. No. 94-222, § 3, 90 Stat. at 197.

In congressional debates on this question, legislators sponsoring or supporting the bill to prohibit surcharges emphasized that surcharging and discounting are different pricing practices distinguished by their relationship to a seller's regular price, and that in 1974, Congress had not intended to exempt credit-card surcharges from TILA's disclosure requirements or protect surcharges from contractual no-surcharge rules. *See The Fair Credit Billing Act Amendments: Hr'g Before the H.R. Subcomm. on Consumer Affairs* ("*FCBA House H'rg*"), 94th Cong. 18, 24, 95-96 (1975) (CIS No. 76-H241-1D); *id.* at 95 (Rep. Annunzio) ("never once was the question of surcharge raised because had it been raised . . . I would have jumped through the ceiling"). As Representative Wylie explained, surcharges and discounts are not identical because a surcharge "is an exaction" collected in addition to a seller's regular price while a discount "is a deduction" subtracted from a seller's regular price. *Id.* at 96; *see id.* at 1 (Rep. Annunzio) ("Let me illustrate how a surcharge works. If an item now has a regular price of $10, under a surcharge [the] credit card customer would pay $10.50, and a cash customer the regular $10 price."); *id.* at 96 (Rep. Wylie) ("[T]o say that the word 'surcharge' and the word 'discount' are synonymous[] makes us all look like fools in my judgment.").

In the course of these discussions, legislators argued that because credit-card surcharging causes economic and consumer harms that discounting does not, surcharging should be not only disclosed but also prohibited. *See FCBA House H'rg*, *supra*, at 1-2. An array of groups supported this surcharge prohibition, including the Consumer Federation of America, *id.* at 5-14; the United Steelworkers of America, *id.* at 19-22; and banking associations and credit-card companies, *id.* at 75-88, 93-94. These groups and congressional legislators explained that credit-card fees increase unfair profiteering by sellers, abusive sales tactics, and consumer confusion.

First, supporters of the surcharge prohibition opined that credit-card surcharging incentivizes sellers to extract windfall profits from consumers. As these supporters explained, sellers would not use surcharges to recoup from credit-card users only the fees that sellers pay to credit-card issuers and banks (hereinafter, "merchant fees")—as sellers claimed in lobbying Congress. *Id.* at 6-8, 17, 89-90; *see id.* at 56 (Atlantic Richfield Petroleum). Rather, as the Consumer Federation of America concluded, sellers would use credit-card surcharges to "maximize profits" by collecting fees far exceeding any cost of credit—particularly in markets that lack "competitive forces" to "safeguard against surcharge abuse" and in industries where customers cannot easily use a different payment method. *Id.* at 6-7 ("[r]enting an automobile, making reservations for tickets and other transactions are often impossible" without a credit card).

Supporters and opponents of the surcharge prohibition also recognized that most sellers would not lower their regular prices if permitted to

surcharge—a failure that would result in sellers collecting profits from credit-card users while other consumers received "no benefit" because they would continue to pay regular prices that already included any actual costs of credit. *Id.* at 1; *see FCBA Senate Hr'g*, *supra*, at 52 (Consumers Union) ("I would be foolish to claim that no merchant will ever inflate his prices."); *id.* at 6 (Federal Reserve) (sellers could "add this surcharge onto their total price schedule"); 127 Cong. Rec. 4225 (Sen. Garn) ("If the Senator believes that the general price level will go down . . . and that the surcharge will not be just an additional cost to the consumer, then I suggest that he believes in the tooth fairy."). And legislators and consumer groups further explained that any actual credit-card costs built into regular prices were difficult to discern because sellers receive significant economic advantages from accepting credit cards, including more customers, higher consumer spending, and a "safe credit plan" for which they bear no risk. *FCBA House H'rg*, *supra*, 20-21.

Second, legislators and congressional witnesses explained that credit-card surcharging increases deceptive and unfair sales practices. They warned, for example, that credit-card surcharges motivate sellers to engage in "bait and switch tactics" that lure customers with regular prices and then collect surprise credit-card fees at the register when consumers may be unwilling to forego the transaction or unable to use another payment form. *Cash Discount Act: Hr'g Before the S. Subcommittee on Consumer Affairs* ("*CDA Senate Hr'g*"), 97th Cong. 1 (1981) (CIS No. 81-S241-15); *see FCBA House H'rg*, *supra*, at 90. And they cautioned that even absent egregious misconduct, sellers can use surcharges to

pressure customers into paying more than they anticipated because most consumers expect the regular price to be "the price" for an item irrespective of "how they pay." *CDA Senate Hr'g*, *supra*, at 18.

Third, legislators, consumer groups, and the Federal Reserve expressed concern that surcharging would cause "incredible confusion" for consumers and hamper their ability to comparison shop. *Id.* at 2; *see id.* at 8. As the Federal Reserve explained, surcharges could "frustrate" consumers by requiring them to solve multiple math problems to understand the cheapest price. *FCBA Senate Hr'g*, *supra*, at 8-9.

Legislators and unions also emphasized that the economic harms from credit-card fees would be particularly burdensome for middle-income consumers, for whom credit-card use is often "a necessity." *FCBA House Hr'g*, *supra*, at 20; *see Credit Card Surcharge Ban: Hr'g Before the H.R. Subcomm. on Consumer Affairs* ("*Surcharge-Ban Hr'g*"), 98 Cong. 72 (1984) (CIS No. 84-H241-35) (New York Consumer Protection Board explaining that consumers often use credit cards for such purchases as buying eyeglasses or repairing a car). As the United Steelworkers union recognized, "[b]ecause many consumers will continue to use credit cards, regardless of the cost," credit-card surcharges would "place an unjustifiable burden" on consumers least able to afford such fees. *Id.* at 21 ("[I]t would be foolish then to assume that the majority of credit cards belong to the affluent who could afford to pay surcharge."); *see* 98 Cong. Rec. 7521 (noting that "41 percent" of adults earning "less than $10,000 a year" and "[n]early 50 percent of our senior citizens" use credit cards).

2. Congress continues its consumer-protection policies by extending the federal surcharge prohibition

Congress twice extended the federal surcharge prohibition for additional time periods. *See* Financial Institutions Regulatory & Interest Rate Control Act, Pub. L. 95-630, § 1501, 92 Stat. 3641, 3713 (1978); Cash Discount Act, Pub. L. No. 97-25, § 201, 95 Stat. 144, 144 (1981).

During debates over the extensions, supporters and opponents of the surcharge ban emphasized the commonsense difference between surcharging and discounting: a seller imposes a credit-card fee by collecting the "regular price plus a surcharge" while a seller gives a discount by providing "a reduction in the regular price." *CDA Senate Hr'g*, *supra*, at 3; *see Cash Discount Act: Hr'g Before the H.R. Subcomm. on Consumer Affairs* ("*CDA House Hr'g*"), 97th Cong. 13 (1981) (CIS No. 81-H241-13) (Rep. Wylie) ("I do not have any trouble with drawing a distinction between [surcharges and discounts]. One is marking it up and the other one is marking it down."); *CDA Senate Hr'g*, *supra*, at 97 (Consumers Union) ("surcharge system" adds fee to "normal price" while "discount system" subtracts amount from "normal price"). And legislators and congressional witnesses again opined that surcharging but not discounting causes windfall profiteering, abusive sales tactics, and customer confusion. *See CDA Senate Hr'g*, *supra*, at 1-3, 56, 59, 64, 105-06, 110.

Legislators also determined that a seller's regular price is easily ascertainable in most retail transactions, and is important to both sellers and consumers. As Senator Chafee explained, most sellers

"list a price" that is the regular price for an item and then "anybody who comes" to the store understands that they are not expected to "pay more than" the regular price "no matter how they pay." *Id.* at 18; *see id.* at 17 (sellers' "list price" is generally price at which "they are prepared to sell" an item irrespective of payment method); *id.* at 106 (describing consumer who goes "into the store" and sees "a pile of sweaters" with a price of "*x* dollars" and knows "[t]hat's the price").

To address the possibility of circumstances when a seller's regular price might not be easily discernible, Congress added a statutory definition for the term "regular price" in 1981. Cash Discount Act, § 102(a), 95 Stat. at 144; *see* 127 Cong. Rec. 2921 (Rep. Annunzio). The definition provided that a seller's "regular price" would be (1) the posted price, if a seller posts only one price; or (2) the credit-card price, if a seller either does not post any price or posts prices for both credit and cash purchases. Cash Discount Act § 102(a), 95 Stat. at 144 (reprinted at U.S. App. 2a). Congress thus defined any system of two posted prices as involving a discount rather than a surcharge. The operative prohibition remained unchanged and continued to prevent a seller from imposing a surcharge on credit-card users, with the "regular price" serving as the "clear benchmark" onto which an impermissible surcharge was added. *Cash Discount Act and National Consumer Usury Commission: H'rg Before the S. Subcomm. on Consumer Affairs*, 96th Cong. 22 (1980) (CIS No. 81-S241-9).

3. The federal surcharge prohibition lapses, but federal law continues to distinguish between surcharges and discounts

Congress again debated the surcharge prohibition when the law approached its expiration in 1984, with many legislators supporting a permanent ban on "extra charge[s] added to" the regular price for credit-card use. *The Cash Discount Act: Hr'g Before the S. Subcomm. on Consumer Affairs* ("*1984 CDA Hr'g*"), 98th Cong. 3 (1984). Business interests lobbying Congress were divided: credit-card companies supported the surcharge prohibition, while retailers and oil companies did not. *Compare id.* at 79-84 (Visa), *with id.* at 246-58 (American Petroleum Institute), *and Surcharge-Ban Hr'g*, *supra*, at 188-98 (American Retail Federation). And the policy issues surrounding credit-card surcharges also "split the consumer movement." *Surcharge-Ban Hr'g*, *supra*, at 63; *see id.* at 249 (Wisconsin Attorney General explaining that "[c]onsumer groups are divided"); *id.* at 63-70 (New York Consumer Protection Board supporting surcharge prohibition). The federal surcharge prohibition ultimately lapsed after the House and Senate failed to resolve an impasse over whether to ban surcharges permanently or to allow such fees, and a compromise to extend the law temporarily did not succeed. *See* CQ Almanac, *Credit Card Surcharges* 297-98 (40th ed. 1984).

Nonetheless, federal law continues to regulate surcharging and discounting as different practices distinguished by their relation to a seller's "regular price." TILA continues to define the terms surcharge and discount separately: a surcharge is "any means of increasing the regular price," 15 U.S.C. § 1602(r),

while a discount is a "reduction made from the regular price" and "shall not mean a surcharge," § 1602(q). And, as prior to enactment of the federal surcharge prohibition, a cash discount is not a "finance charge" subject to TILA's disclosure requirements if offered to all buyers and "disclosed clearly and conspicuously," *id.* § 1666f(b), but a credit-card surcharge is a finance charge subject to certain disclosure requirements, *see id.* (containing no surcharge exemption).

Moreover, the Durbin Amendment, enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, also uses a seller's regular price to distinguish between surcharging and discounting, and to subject those two practices to differing regulatory treatment. Pub. L. No. 111–203, § 1075, 124 Stat 1376, 2072-73. The amendment prevents credit-card networks from using their private contracts with sellers to prohibit sellers from providing certain *discounts* to consumers paying with "cash, checks, debit cards, or credit cards," but does not similarly protect *surcharges* imposed based on consumers' payment method. 15 U.S.C. § 1693o-2(b)(2)(A). And protected discounting is differentiated from unprotected surcharging: a "discount" is a "reduction made from the price that customers are informed is the regular price," but not an increase from that "regular price." *Id.* § 1693o–2(c)(4).

B. New York's Enactment of a Credit-Card Surcharge Prohibition Modeled on the Prior Federal Surcharge Ban

In 1984, after the federal surcharge law expired, New York made the policy choice to prohibit credit-card surcharges. (J.A. 84; *see* J.A. 67, 80-81). New York's surcharge prohibition adopts the operative

prohibition of the prior federal law: "no seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash..." GBL § 518 (*reprinted in* U.S. App. 1a). Although the statute does not expressly incorporate the federal definitions, the New York Legislature made clear that New York's law was intended to parallel the federal prohibition on "increasing the regular price" for an item based on credit-card use. (J.A. 86; *see* J.A. 81.) And like Congress, New York did not regulate the separate practice of discounting, i.e., reducing the regular price for consumers using a particular payment form. (*See* J.A. 80, 86.)

As both legislators and the New York Consumer Protection Board made clear, the state surcharge prohibition continues the same consumer-protection purposes of the lapsed federal ban. (J.A. 82, 84-86.) Specifically, the State Legislature prohibited credit-card surcharging because it determined that this practice incentivizes sellers to reap "windfall" profits without providing any "concomitant benefit for consumers" (J.A. 86); increases "dubious" tactics that place consumers at an "unfair disadvantage" (J.A. 82-83); and causes consumer confusion that can hurt the economy (*see* J.A. 89). These policy determinations are supported by the legislative records of the prior federal surcharge prohibition on which New York based its statute. (*See* J.A. 82-86.)

II. Private Antitrust Lawsuits

Until recently, state no-surcharge laws were "effectively redundant" because private contractual agreements between sellers and credit-card companies prohibited sellers from imposing credit-card surcharges. (Pet. App. 9a.) In 2005, sellers began filing class-action lawsuits asserting federal antitrust claims against credit-card companies based, in part, on the contractual surcharge prohibitions. (*See* Pet. App. 9a n.5.) The parties to those litigations entered into two class-action settlements in which the credit-card companies agreed, among other things, to lift the contractual surcharge restrictions under certain conditions. *See In re Am. Express Anti-Steering Rules Antitrust Litig.* ("*AmEx*"), 11-MD-2221, 2015 WL 4645240, at *3-*5 (E.D.N.Y. Aug. 4, 2015). However, these settlements have since been invalidated by the courts, in one case because of inadequate representation of the class plaintiffs, *see In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.* ("*Interchange Fee*"), 827 F.3d 223, 228-30 (2d Cir. 2016), *petition for cert. filed*, No. 16-710 (U.S. Nov. 29, 2016), and in another case because of "egregious conduct" by the class plaintiffs' co-lead counsel that rendered the settlement procedurally unfair, *AmEx*, 2015 WL 4645240, at *13-*21. As a result, the future of the contractual no-surcharge rules is uncertain.

Although these settlements failed to gain final court approval, the settlements are important because they show that both sides understood an objectively ascertainable difference between surcharges and discounts, defined in relation to an objectively ascertainable regular transaction price. *See* Settlement Agreement 20-23, *AmEx*, No. 11-MD-02221 (ECF No. 306-2, Ex. A); Settlement Agreement 49-54,

Interchange Fee, No. 05-MD-1720 (ECF No. 1656-1, Ex. 1). Specifically, the agreements placed restrictions on credit-card surcharging that did not apply to discounts. *See, e.g.*, Settlement Agreement 41-42, *Interchange* (ECF No. 1656-1, Ex. 1).

III. This Litigation

A. Petitioners' Lawsuit

In 2013, petitioners—five businesses (and their owners)—filed this lawsuit against the New York Attorney General and three county district attorneys to challenge the constitutionality of New York's surcharge prohibition under the First and Fourteenth Amendments of the United States Constitution. (J.A. 1, 24, 38-39.) Petitioners allege that they want to impose credit-card surcharges on consumers by setting "only a single price for their goods and services" and collecting "more than that price [from] credit-card customers." (Pet. App. 15a; *see, e.g.*, J.A. 101 ("Five Points Academy would like to impose an extra charge" for credit-card use).)

Petitioners allege that they do not impose such fees because they understand that Section 518 forbids credit-card surcharges. (*See, e.g.*, J.A. 26.) Although petitioners also understand that New York law allows them to provide discounts to consumers who use cash or other payment forms, four petitioners assert that they do not do so. (J.A. 43, 47, 52, 57.) Petitioners also allege that they do not want to set two separate prices—a "cash price" and a "credit-card price"—for each item or service they sell. (Pet. App. 16a; *see* J.A. 101, 104.) One petitioner, Expressions Hair Design, alleges that it currently engages in a pricing practice that results in a credit-

card user and a cash user paying different prices. However, Expressions does not explain whether it achieves that result by providing cash discounts—i.e., collecting less than its regular prices for cash payment—or by setting different cash prices and credit-card prices for each product and service. (*See* J.A. 59-62.) No petitioner alleges that it has faced any enforcement action or threat of enforcement action for its pricing practices.

B. The District Court's Decision

The United States District Court for the Southern District of New York (Rakoff, J.) held that New York's surcharge law regulated speech in violation of the First Amendment, and issued a preliminary injunction prohibiting the enforcement of the surcharge law against petitioners. (Pet. App. 85a.) The court acknowledged that the surcharge prohibition "by its terms only prohibits credit-card 'surcharges'" (Pet App. 57a), and that "[p]ricing is a routine subject of economic regulation" that does not itself implicate the First Amendment (Pet App. 74a). But the court nevertheless concluded that the surcharge prohibition "regulates speech, not conduct" (Pet. App. 73a), reasoning that surcharges and discounts are always identical and thus distinguishable only by "words and labels." (Pet. App. 68a, 73a.) The court also concluded that the surcharge prohibition did not pass the test for commercial-speech regulations developed in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), and was impermissibly vague. (Pet. App. 75a-80a.)

The parties then stipulated to a court-ordered final judgment declaring the surcharge law unconsti-

tutional and issuing a permanent injunction. The defendants reserved their right to appeal.[3] (Pet. App. 48a-54a.)

C. The Second Circuit's Decision

The U.S. Court of Appeals for the Second Circuit vacated the judgment and remanded for dismissal of the complaint. (Pet. App. 3a.) The court determined that petitioners are challenging the application of New York's surcharge prohibition to "two distinct kinds of pricing schemes," and separately analyzed the constitutionality of each such prohibition. (*See* Pet. App. 13a-18a, 31a-37a.)

First, the court considered the only pricing practice in which petitioners "would like to be engaged" (Pet. App. 18a)—setting a single "regular price" and then extracting additional money in excess of that baseline price when consumers use a credit card. (Pet. App. 3a; *see id.* 14a-15a, 11a.) The court found that New York's statute prohibited this pricing practice based on the "ordinary meaning" of the term "surcharge"—i.e., levying an "additional amount above the seller's regular price" (Pet. App. 13a-14a).

The court held that this prohibition is constitutional. As to petitioners' First Amendment claim, the court determined that the prohibition against extracting credit-card fees in excess of a seller's regular price is a direct price control that regulates "conduct, not speech" and thus does not

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[3] The final judgment also dismissed petitioners' antitrust claim, which is not at issue here, without prejudice to petitioners renewing this claim if the final judgment were to be reversed. (Pet. App. 51a.)

implicate the First Amendment at all. (Pet. App. 27a, *see id.* 18a-28a.) The court also held that this prohibition was not transformed into a speech restriction simply because it allows sellers to engage in discounting, the distinct practice of collecting an amount "*below* the regular price" for consumers using cash. (Pet. App. 14a.)

The court rejected petitioners' theory that surcharging and discounting are synonymous practices and that the surcharge prohibition thus restricted only the "words and labels" used to describe the price differentials between the final prices paid by credit users and cash users. (Pet. App. 20a.) Rather, the court explained: "What Section 518 regulates—all that it regulates—is the difference between a seller's [regular] sticker price and the ultimate price that it charges to credit-card customers." (Pet. App. 21a-22a.) A seller remains free to characterize the price differential between credit-card users and cash users "as whatever it wants"—i.e., as a surcharge or a discount—but such descriptions "would not change the fact" that adding credit-card fees to a regular price is prohibited while deducting amounts from a regular price is permitted. (Pet. App. 22a.)

The court also rejected petitioners' vagueness challenge with respect to such run-of-the-mill surcharging schemes, concluding that both "sellers 'of ordinary intelligence'" and enforcement authorities would "readily understand" that adding credit-card fees above a seller's regular price violates the statute. (Pet. App. 42a.)

Second, the court considered whether New York's surcharge prohibition would also prohibit hypothet-

ical pricing methods that lack an easily discernible regular price—such as scheme in which a seller actually sets separate "credit prices" and "cash prices." (Pet. App. 15a.) Noting that the New York appellate courts had never interpreted the scope of New York's statute (Pet. App. 32a), the court abstained from ruling on the statute's constitutionality with respect to such practices under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). (Pet. App. 28a, 45a.) The court explained that *Pullman* abstention was appropriate because the statute is "readily susceptible to a construction under which" it does not apply to abstract pricing schemes that lack regular prices (Pet. App. 18a (quotation marks omitted)) and "it is entirely possible, if not likely, that New York courts" would adopt that statutory interpretation (Pet. App. 35a).

SUMMARY OF ARGUMENT

I. Petitioners challenge a New York statute that prohibits sellers from imposing extra fees on consumers who use a credit card. This prohibition on credit-card surcharging is a direct price regulation that targets conduct and thus does not implicate the First Amendment at all.

Price controls have long been considered direct economic regulations that do not target speech because they regulate what sellers can do when collecting money from customers. Like many such pricing regulations, and like a federal law that was in place from 1976 to 1984, New York's surcharge prohibition regulates conduct by restricting the amount of money a seller can collect in relation to a

baseline price—specifically, a seller cannot impose a surcharge by collecting more than its regular price from credit-card users.

Petitioners' attempts to recharacterize this regulation of pricing conduct as a speech restriction are meritless. Their argument that surcharges and discounts are merely two ways of describing the same conduct ignores the baseline regular price on which the surcharge prohibition turns. Against that baseline, surcharges and discounts are not interchangeable "labels," but rather mutually exclusive adjustments up or down from the regular price.

Similarly, petitioners are wrong to assert that Section 518 has no meaningful effect on pricing conduct—and thus must be a speech regulation—because sellers can impose whatever price they want on credit-card users so long as they structure their pricing scheme in a way that sets the regular price at or above the credit-card price. Such a constraint on sellers' pricing practices *is* a regulation of economic conduct. And contrary to petitioners' unsupported assumption, Section 518 does meaningfully limit credit-card prices by requiring that they be no higher than sellers would be willing or able to set their regular prices.

Section 518 imposes no other restraints on sellers. Sellers thus remain free to communicate their views about credit-card costs, and to characterize their prices—or price differentials between different categories of users—in any way they see fit.

II. New York's surcharge prohibition would satisfy the First Amendment even if it affected speech. At most, the law regulates the bare commercial speech of conveying prices, and would thus be subject to more deferential First Amendment scrutiny under the *Central Hudson* framework for commercial speech or the standards set forth in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) for disclosure rules. No higher scrutiny would be warranted because the surcharge prohibition does not turn on any topic, idea, or expressive message.

The surcharge prohibition would pass muster under *Central Hudson* because it implements a narrow regulation that directly advances the State's substantial interests in protecting consumers from unfair profiteering, preventing deceptive and abusive sales tactics, and reducing consumer confusion that harms the economy. New York's law would also satisfy the *Zauderer* framework because it parallels the prior federal surcharge prohibition in ensuring that consumers are informed of the highest price that a seller would charge on account of credit-card use.

III. The surcharge prohibition is not unconstitutionally vague. In the vast majority of retail transactions, there can be no plausible confusion over whether a seller is imposing a surcharge above the regular price or a discount below the regular price. And where a seller truly has both a "credit-card price" and a "cash price," the surcharge prohibition would not apply because the seller has forgone the usual commercial practice of setting a regular price. While other, borderline cases can be imagined, such hypothetical possibilities are

insufficient to invalidate New York's law on vagueness grounds.

ARGUMENT

I. New York's Surcharge Prohibition Is a Direct Economic Regulation Not Subject to First Amendment Scrutiny.

New York's prohibition on credit-card surcharging is a direct price regulation that controls how sellers set prices and collect money from their consumers, not what they may or may not say about their prices. The statute provides that a seller may not "impose a surcharge" on credit-card users. GBL § 518. By its plain terms, this law prohibits sellers from collecting additional money, in excess of the usual or regular price, from consumers who pay with a credit card. (Pet App. 13a-14a (citing *Webster's Third New International Dictionary* 2299 (2002) (defining "surcharge" as "a charge in excess of the usual or normal amount"); *Black's Law Dictionary* 1579 (9th ed. 2009) (defining "surcharge" as "[a]n additional tax, charge, or cost").) Put another way, the law effectively requires sellers that have chosen to take credit cards to accept the use of a card when a customer is willing to pay the usual or regular price. The First Amendment does not apply to such direct regulation of economic conduct.

A. The Surcharge Prohibition Regulates Sellers' Conduct, Not Their Speech, by Preventing Them from Collecting Money from Credit-Card Customers above the Regular Price.

1. As petitioners concede (Pet. Br. 34-36; *see* U.S. Br. 14, 16), price regulations do not implicate the First Amendment at all because they regulate economic conduct rather than speech: they prevent sellers from collecting money above (or below) a benchmark price, or mandate that the seller provide a good or service to all customers willing to meet a certain price. Regulations fixing prices have existed "from time immemorial, and in this country from its first colonization." *Munn v. Illinois*, 94 U.S. 113, 125 (1876). And this Court has routinely upheld such laws so long as they have a rational basis, without subjecting them to First Amendment scrutiny. *See, e.g.*, *Mobile Oil Exploration & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 221-26 (1991) (natural gas); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398-99 (1937) (minimum-wage laws); *Nebbia v. New York*, 291 U.S. 502, 519-20, 539 (1934) (milk); *Griffith v. Connecticut*, 218 U.S. 563, 564 (1910) (usury laws); *see also Olsen v. Nebraska ex rel. W. Reference & Bond Ass'n*, 313 U.S. 236, 244-45 (1941) (collecting cases).

This Court has already held that a law may prohibit a seller from charging more or less than a specified price without implicating the First Amendment. In *44 Liquormart, Inc. v. Rhode Island*, eight justices agreed that, while the First Amendment prohibited Rhode Island from banning advertisements about lawful liquor prices, the State could have instead directly required sellers to

maintain "higher prices" for alcohol; such a regulation "would not involve any speech restrictions" at all. 517 U.S. 484, 507 (1996); *see id.* at 530 (O'Connor, J., concurring in the judgment) ("establishing minimum prices" would not restrict speech); *id.* at 524 (Thomas, J., concurring in part and concurring in the judgment) ("controlling [the] price" of an item involves "no restriction on speech").

2. The rule should be no different if the baseline to evaluate pricing conduct is not a specific numeric price dictated by law, but rather the seller's regular price—i.e., the price given to customers, by tag or sign or other means, before they indicate whether and how they intend to pay. Put simply, Section 518 provides that a seller may not collect more than the regular price from a customer on account of his use of a credit card. The regular price thus serves in effect as a price ceiling for credit-card users.

Numerous other laws regulate prices in this manner—i.e., by using a seller's regular price as a benchmark, and dictating how a seller may adjust that price. For example, laws mandate or prohibit various discounts from a seller's regular prices: requiring telecommunications providers to give discounts below their regular rates to schools and libraries, 47 U.S.C. § 254(h)(1)(B); or prohibiting tobacco sellers from giving discounts below the regular price for a pack of cigarettes, *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 74, 77-78 (1st Cir. 2013) (rejecting First Amendment challenge). *See also* Fla. Stat. § 627.0652(1) (insurance providers must give discounts below regular premium to certain drivers). Likewise, many laws prohibit or limit extra fees or surcharges over a seller's regular prices: capping fees

to add an additional driver to a rental car, GBL § 396-z(10)(d); or prohibiting credit-card issuers from imposing a surcharge to a consumer's credit balance for the privilege of paying the bill via electronic or other means, 15 U.S.C. § 1637(*l*). None of these laws dictates the regular or usual prices that sellers may charge. Rather, like New York's ban on credit-card surcharges, they use the regular price as a benchmark for determining whether a seller's departure from that regular price is lawful.

Indeed, petitioners apparently concede (Pet. Br. 43) that a cap on credit-card surcharges (say, at 5% above the regular price) would be "a permissible regulation of conduct" not subject to First Amendment scrutiny. But there is no constitutionally significant difference between such a cap and New York's law—both statutes set a benchmark based on a seller's regular price, and forbid sellers from collecting money from credit-card users above that benchmark. If a State may prohibit credit-card surcharges that exceed a certain percentage above the regular price, then the First Amendment provides no reason that the State may not set that percentage at zero and prohibit all such surcharges.

3. The New York Legislature, like Congress before it, reasonably looked to sellers' regular prices as a benchmark to define the credit-card surcharges it wished to prohibit. As those legislative bodies recognized, regular prices are a familiar feature of everyday life: sellers routinely set "single, readily ascertainable prices for their goods or services" (Pet. App. 15a); and in practice they convey those regular prices to customers—whether on stickers, tags, menus, or the digital displays of cash registers—before customers decide how, or even whether, they

will pay. *See CDA Senate Hr'g*, *supra*, at 106 (Senator Chafee) (explaining that consumers "go into the store and look around, and there is a pile of sweaters and the price is *x* dollars. That's the price."). Surcharges and discounts are ordinarily understood to be adjustments to those regular prices—for example, a store will apply a coupon to the sticker price for a book. *See id.* at 3 (statement of Congressman Annunzio). *See generally* Rafi Mohammed, *The 1% Windfall* 88-109 (2010) (describing multiple ways of adjusting regular prices). Section 518 regulates this familiar commercial process by providing that a seller may not apply an upward adjustment relative to a previously conveyed regular price when, at the end of the transaction, the customer decides to use a credit card to complete the purchase.

Petitioners have never disputed—and could not dispute—that sellers routinely engage in the conduct of setting regular prices by which their subsequent pricing conduct (including credit-card surcharges) can be evaluated. Their own allegations confirm this pricing practice. For example, petitioner Five Points Academy wishes to have "a single set of prices" and then collect an additional "credit card surcharge amount" above those regular prices (J.A. 102). And petitioner Brooklyn Farmacy similarly wishes to set a single price on its menu for each food item and to collect an additional credit-card surcharge in excess of those regular prices. (J.A. 51-52.) Likewise, when investigators from the New York Attorney General's office contacted oil and gas companies for their pricing, those companies were willing to quote an initial regular "price of fuel (for example, $3.45/gallon)," and only later added "a surcharge *on top of that price*" (for example, of five cents per

gallon) when the investigators sought to pay with a credit card.[4] (J.A. 106 (emphasis added); *see also* J.A. 115, 124.)

New York's surcharge prohibition thus relies on a familiar and well-understood baseline to determine the validity of sellers' further pricing adjustments. Such regulation of economic conduct does not implicate the First Amendment.

B. Petitioners Incorrectly Characterize New York's Law as a Speech Regulation.

1. Petitioners ignore Section 518's use of the regular price as a baseline.

a. Petitioners' contention that New York's surcharge ban is a speech restriction rests on the mistaken premise that the difference between surcharging and discounting is not an objectively ascertainable difference in conduct, but only a difference in the words used to describe identical conduct. But petitioners are simply wrong to assert that "[a] 'surcharge' and a 'discount' are just two ways of framing the same price information." (Pet. Br. 1; *see id.* at 6-7, 28-30, 37, 49-50.) "Surcharge" and "discount" are not interchangeable ways of describing a deviation from a seller's regular price. To the contrary, they are mutually exclusive terms that identify whether a final price is above or below the regular price—just as going up and going down

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[4] Contrary to petitioners' mischaracterization (Pet. Br. 18), it was the companies' imposition of an additional fee on top of the usual or regular price that triggered enforcement of Section 518—not their failure to follow a "script" to describe their pricing.

from a particular floor in an elevator are distinct and mutually exclusive actions.

The relevant conduct here is thus not, as petitioners contend, "dual pricing"—i.e., charging "a higher price for those who pay by credit card [and] a lower one for those who pay in cash." (Pet. Br. 1.) Rather, the relevant conduct is the price charged to credit-card users relative to the seller's regular price, i.e., the price conveyed to buyers before a payment method has been identified.[5] So long as the seller conforms to the requirement that the credit-card price be no higher than the regular price, the seller's treatment of other payment methods is immaterial.

b. Because Section 518 regulates the relationship between the credit-card price and the regular price, a seller does not, as petitioner suggests, engage in "the same conduct" whenever it charges a particular price to credit-card users, regardless of the seller's regular price. (Pet. Br. 2; *see also* U.S. Br. 19.) Conduct may meaningfully be defined in relation to a baseline or benchmark, or with respect to other attendant circumstances. *Cf.* Model Penal Code § 1.13 (recognizing that "attendant circumstances" may be "included in the description of the forbidden conduct"). And prohibiting conduct in some circumstances but not others is still prohibiting conduct, not speech.

For example, "speeding" under the traffic laws is typically defined as driving "in excess of . . .

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[5] The regular price may *coincide* with the price that either cash or credit-card users pay, but a seller could also set a regular price that applies to many other methods of payment (debit cards, store cards, gift cards, personal checks, and so on), while deviating from that price for both cash and credit cards.

maximum speed limits," N.Y. Vehicle & Traffic Law § 1180(d). A person who drives at 40 mph when the speed limit is 25 mph thus engages in "speeding," while a person who drives at the same speed when the limit is 70 mph does not. As a physical matter the two drivers' behavior is the same, but under the traffic laws they have engaged in meaningfully and legally distinct conduct.

The law may also establish a benchmark drawn from a regulated entity's own actions. For example, a statute mandating that law schools provide "equal access" to military recruiters does not require any particular treatment of military recruiters; rather, it requires a law school to "appl[y] to military recruiters the same policy it applies to all other recruiters." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 56 (2006) ("*FAIR*"). A law school engages in impermissibly discriminatory conduct under such a statute if the access it affords to military recruiters is narrower than the access it provides to others—even though another school could permissibly treat military recruiters the same way if it had a more limited access policy for other groups in the first instance.

So too here. The relevant conduct under New York's surcharge prohibition is not simply the final price charged to credit-card customers, but rather the relationship between that price and the regular price. Contrary to petitioners' arguments, the fact that a $102 charge to a credit-card customer is lawful if the regular price is $102, but unlawful if it is $100, does not mean that New York's law has drawn a distinction based on speech. Rather, as with laws about speeding or equal access, New York's law has permissibly prohibited conduct based on the

relationship between that conduct and an objectively ascertainable baseline.

c. Section 518's reliance on a seller's regular price as a baseline for evaluating liability means that the statute has no application when a regular price cannot be readily ascertained. One such situation is when a seller posts one "dollars-and-cents price" for credit cards, and another "dollars-and-cents price" for cash. (U.S. Br. 19.)

The court below, relying on *Pullman* abstention, declined to address the applicability of Section 518 to such a situation on the ground that it was not presented by the complaint and not settled by New York appellate authority (Pet. App. 28a, 32a), and this Court could do the same. But in fact Section 518's non-application under such circumstances is fairly inferred from both its plain text and its history. Implicit in the concept of a "surcharge" is a "usual or normal" price onto which the surcharge is added. *Webster's Third New International Dictionary* 2299 (2002). In the absence of such a "usual or normal" price, there is no meaningful basis to determine whether a seller has imposed a "surcharge" from such a price, and thus no occasion to apply Section 518.[6] And this interpretation is supported by the fact that the prior federal surcharge prohibition, which New York's law was intended to parallel, also would not apply in such a situation. (Pet. App. 31a-32a; U.S. Br. 3-4, 7-8.)

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[6] The one reported criminal prosecution under Section 518, *People v. Fulvio*, is best understood as falling within this category of cases. See *infra* Point III.

Because Section 518 does not apply when a regular price cannot be identified, it imposes no restraints on sellers' prices or descriptions of their prices under such circumstances. Pricing schemes that do not involve regular prices thus do not affect the statute's constitutionality.

2. Section 518 meaningfully affects sellers' conduct even though it does not dictate final prices.

New York's surcharge prohibition does not restrict the final prices that sellers may charge. Petitioners cite that fact to argue that Section 518 "does not in any way regulate what merchants may *do*" because a seller that wishes to charge credit-card users a certain price (or a certain price differential above cash users) can do so under New York's law simply by raising their regular prices. (Pet. Br. 28.)

As a threshold matter, this argument wrongly assumes that a seller's increase of its regular price to match its credit-card price is meaningless if the credit-card price remains the same. In fact, that increase is a meaningful change in a seller's pricing conduct that advances the goals of the surcharge prohibition: for example, aligning the regular price to the credit-card price prevents credit-card customers from being surprised by a later-imposed surcharge. See *supra* at 7-8.

In any event, petitioners offer no support for their supposition that tying credit-card prices to regular prices imposes no meaningful constraint on the prices that sellers will charge to credit-card customers. The New York Legislature, like Congress before it, could reasonably have believed otherwise.

Sellers may be less willing to raise their overall regular prices than to impose a surcharge on particular subgroups of customers, since regular prices typically apply more broadly and are more widely distributed, and thus have greater effects when changed. And sellers may face constraints in setting their regular prices that they would not face with surcharges. Regular prices may be dictated by suppliers, *State Oil Co. v. Khan*, 522 U.S. 3 (1997), or by franchisors, *Nat'l Franchisee Ass'n v. Burger King Corp.*, 715 F. Supp. 2d 1232 (S.D. Fla. 2010). And regular prices are subject to market forces and consumer expectations. *Cf. Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 348 (1982) (recognizing "price competition as a market force"). For example, if consumers have come to expect that a hot dog will cost only $1, then a seller may be forced to set his posted regular price at $1 or else risk losing business to its competitors. Because regular prices thus face constraints that more narrowly applicable surcharges may not, tying credit-card prices to regular prices will inhibit certain price increases altogether.

Many other statutes similarly rely on presumed constraints on regular prices to limit a seller's further pricing conduct. For example, price-gouging laws prohibit sellers from imposing excessive surcharges above their regular prices during unusual market disruptions. *See, e.g.*, GBL § 396-r; Vt. Stat. tit. 9 § 2461d; Miss. Code. § 75-24-25. Although sellers could in theory set their regular prices at extortionate rates from the outset, price-gouging laws presume that market forces will prevent sellers from doing so, and mandate that sellers adhere to those prices even when market conditions would allow for sharp price increases. New York's credit-card surcharge prohibi-

tion restricts seller conduct in a similar manner (Pet. App. 27a n.10): it assumes that in the mine run of cases sellers will be unable or unwilling to increase their regular prices to the same degree that they would be willing to impose a surcharge on credit-card users.

Petitioners' abstract hypotheticals (*e.g.*, Pet. Br. 2) simply ignore the practical constraints on a seller's ability to set its regular prices and assume that the regular price may be set at any arbitrary level that allows a seller to charge a particular price to credit-card users. Similarly abstract reasoning would suggest that price-gouging laws are meaningless because sellers could in theory charge supra-competitive prices all the time to preserve their ability to levy such prices during market disruptions. But in deciding whether and how to address credit-card surcharges or price-gouging, New York's Legislature (like Congress before it) was entitled to rely on its understanding of how sellers set regular prices in the real world, rather than in the abstract. *Cf. Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2589 (2012) (observing that the framers of the Constitution "were practical statesmen, not meta-physical philosophers" (quotation marks omitted)). And given the practical limitations on sellers' ability or willingness to inflate their regular prices, a regulation of credit-card prices that sets the regular price as a cap meaningfully constrains sellers' pricing conduct.

3. Consumers' adverse reactions to credit-card surcharges do not imply that those surcharges are speech.

Petitioners contend that surcharges and discounts must be mere "labels" because consumers react negatively to surcharges but not to discounts. (Pet. Br. 1, 15-16, 30-32.) But this argument "plainly begs the question," as the court of appeals correctly observed (Pet. App. 22a). Customers react to seller's conduct just as much as they react to seller's speech; the fact that consumers react negatively to surcharges thus does not answer "the threshold question" of whether the surcharge prohibition regulates conduct or speech. (Pet. App. 23a.)

Indeed, the relevant evidence suggests that customers react badly to surcharges not because of some "message" they convey, but rather because they understand surcharges as the seller's collection of extra fees above its regular price—conduct that is upsetting because the seller has in effect reached into their pockets and taken additional money. *See FCBA House Hr'g, supra,* at 7; CHOICE, *Credit Card Surcharging in Australia* 4 (2010) (68% of surveyed consumers "believe that retailers and other businesses should not be allowed to charge customers extra" for credit-card use). The behavioral-economics literature relied on by petitioners does not say otherwise. Although this literature confirms the commonsense notion that consumers are emotionally affected by deviations from a seller's regular prices, it does not prove *why* they are so affected. *See, e.g.*, Daniel Kahneman et al., *Anomalies*, 5 J. Econ. Persp. 193, 203-04 (1991).

The New York Legislature's awareness that surcharging and discounting can have different effects on seller and consumer behavior also does not prove that the surcharge prohibition regulates speech. (*See* Pet. Br. 31-32.) Many direct price controls are designed to influence consumer behavior by triggering negative sentiment about higher prices, thereby reducing consumer purchasing. *See 44 Liquormart*, 517 U.S. at 507 (plurality op.); *see Tobacco Outlets*, 731 F.3d at 74 (prohibition on discounts sought to "reduce youth tobacco use"). That the purpose of these economic regulations is to influence behavior does not alter the fact that they seek to achieve their goal by regulating conduct rather than speech.

4. Section 518's reliance on a seller's regular price to determine liability does not regulate speech.

Section 518's requirement that a seller's credit-card price be no higher than its regular price depends on and may affect the regular "sticker price" that a seller conveys to customers. (*See* U.S. Br. 19.) But that effect on seller's communications does not implicate the First Amendment. As petitioners have conceded (Pet. App. 25a-26a), prices are not themselves speech. That is why direct regulation of prices is deemed to be a regulation of conduct not subject to First Amendment scrutiny (U.S. Br. 14, 16).

More fundamentally, even if the communication of prices were in some sense protected expression, New York's surcharge ban could permissibly rely on the regular price to determine liability. "[I]t has never been deemed an abridgement of freedom of

speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). For example, state law may require individuals to adhere to their contractual promises, even when those promises were previously communicated through speech (U.S. Br. 18). *See also FAIR*, 547 U.S. at 61 (holding that conduct may be evaluated with reference to "elements of speech").

New York's surcharge ban relies on the regular price in a similar manner. New York's law does not "dictate the content" of the regular price or directly control it. *See id.* at 62. To the contrary, a seller remains free to set whatever regular price it wants. All that New York's law does is use that regular price as a baseline to evaluate further price adjustments. Any effect that the surcharge prohibition might have on the seller's conveyance of a regular price is thus "plainly incidental" to the statute's "regulation of conduct." *Id.*

C. The Surcharge Prohibition Does Not Target Any Protected Speech.

1. The surcharge prohibition does not prevent any expression about credit-card costs.

New York's surcharge prohibition does not, as petitioners assert, prevent sellers from "using their most effective means of informing consumers of the cost" of credit cards. (Pet. Br. 7; *see also id.* at 27.) Petitioners "remain free under the statute to express whatever views they may have" about merchant fees, just as law schools are free to criticize or protest

against military recruiters so long as they give them equal access to on-campus recruiting. *FAIR*, 547 U.S. at 60. And petitioners acknowledge that they have in fact engaged in such advocacy, without any threat of enforcement under Section 518. (*E.g.*, J.A. 50, 57; Pet. Br. 19-20.)

Petitioners nonetheless maintain that the law targets protected expression because the very act of "imposing a surcharge" (J.A. 47) inherently communicates to consumers "how much they pay for credit" (Pet. Br. 7). But this conduct is not "inherently expressive." *FAIR*, 547 U.S. at 66. "Unlike flag burning," charging consumers an extra fee for credit-card use does not communicate any inherent message to customers aside from the fact that the seller is collecting more money above his regular price. *See id.*; *cf. Texas v. Johnson*, 491 U.S. 397 (1989). A consumer "has no way of knowing," *FAIR*, 547 U.S. at 66, that the seller has exacted the additional fee to express disapproval about merchant fees rather than for some other reason, such as seeking to obtain further profits from consumers. Indeed, nothing about a credit-card surcharge tells consumers that merchant fees even exist, let alone that the sellers have any particular view about such fees. *See id.* And any such message is further diluted by the fact that petitioners' proposed credit-card surcharges *do not match* the merchant fees they are actually charged, which vary widely for each credit-card transaction. (*See, e.g.*, J.A. 60; U.S. Br. 2.) Surcharges cannot convey "the true costs of credit" (Pet. Br. 28) if they do not actually match those purported costs.

Ultimately, consumers cannot plausibly receive any coherent message about merchant fees from the mere imposition of a credit-card surcharge alone.

Rather, the only way for customers to receive petitioners' desired message is for petitioners to tell customers about the underlying merchant fees and about plaintiffs' view that these fees are unfair. But at that point it would be the "explanatory speech" rather than the surcharge that is expressive. *See FAIR*, 547 U.S. at 66. Because Section 518 does not regulate any such collateral advocacy, the law regulates conduct rather than speech. *See id.*; *see also Tobacco Outlets*, 731 F.3d at 78.

2. The surcharge prohibition does not restrict any descriptions about lawful prices.

Petitioners also contend that the surcharge prohibition restricts speech because it turns on the words that sellers use to describe their prices, rather than on the prices themselves. (Pet. Br. 1.) But as the court of appeals correctly recognized, New York's law affects only "the actual imposition of a credit-card surcharge," not "the words that speakers of English have chosen to describe that pricing scheme." (Pet. App. 21a.) So long as a seller collects no more than the regular price from credit-card customers, it is free to describe its prices—including the price differentials between different types of users—however it wishes. (Pet. App. 22a.)

Thus, a seller is free to "tell [its] customers" that a credit-card user ultimately pays "more" than a cash user. (*See* Pet. Br. 1; *see id.* at 50.) It can post a sign saying that its regular prices include a 3% component attributable to the costs of credit cards. (*See* J.A. 60-61; Pet. Br. 50.) Indeed, as the court below observed, a seller could even characterize the credit-card price as containing a "surcharge" over the cash price, so

long as the credit-card price was at or below the regular price quoted to prospective buyers before a payment method was identified. (Pet. App. 22a.) These descriptions are all perfectly legal and "would not change the fact" that the seller is in compliance with Section 518. (*Id.*)

II. Even if the Surcharge Ban Were Viewed as a Regulation of Speech, It Would Be Permissible Under the First Amendment.

A. The Surcharge Prohibition Is Subject at Most to the *Central Hudson* Test as a Regulation of Commercial Speech.

1. Even if the surcharge prohibition had more than an incidental effect on protected expression (which it does not), it would satisfy First Amendment scrutiny. As discussed above, a seller violates New York's law when it charges a credit-card price in excess of its regular price; that seller can come into compliance with the law either by raising the regular price or by reducing the credit-card price. So long as this pricing requirement is satisfied, New York's law imposes no restrictions on how sellers characterize their prices or how they describe the differential between credit-card prices and prices for other specific methods of payment. (See *supra* Point I.C.1; U.S. Br. 26, 30.) The only expression even arguably affected by the surcharge prohibition is thus a seller's communication of its regular or credit-card prices.

Such expression of price information is at most a form of commercial speech subject to the *Central Hudson* framework. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976); *Central Hudson*, 447 U.S. at 563-66. This

Court has already held that *Central Hudson* applies to regulations targeting advertisements *about* otherwise lawful prices. *See 44 Liquormart*, 517 U.S. at 504-08 (plurality op.); *id.* at 528-31 (O'Connor, J. concurring in the judgment). The same framework should accordingly apply to regulations targeting the initial communication of prices, to the extent that such communication is speech at all. *See Dana's R.R. Supply v. Attorney General*, 807 F.3d 1235, 1249 (11th Cir. 2015) (holding that credit-card surcharge ban is subject to *Central Hudson* test).

2. Petitioners and several of their amici agree that *Central Hudson* would be the proper framework for evaluating Section 518 as a speech regulation. (Pet. Br. 35-36; *see* U.S. PIRG Br. 14; Retail Litigation Center Br. 28; First Amendment Scholars Br. 16.) But petitioners' *Central Hudson* analysis is distorted by their incorrect view of the speech at issue. Petitioners assert that the speech constrained here is the "label" of "surcharge" or "discount" that a seller uses to "truthfully" describe an otherwise lawful price differential between cash and credit-card prices. (Pet. Br. 30-31, 35, 37.) But this characterization simply misconstrues New York's statute. As explained (*supra* Point I.C.2), Section 518 leaves sellers free to characterize price differentials between different methods of payment however they want. The only restriction imposed is that sellers must structure their prices in a particular way: specifically, the regular price conveyed to consumers cannot be lower than the price conveyed to credit-card users. (*See* Pet. App. 25a-26a.)

The *Central Hudson* inquiry thus does not turn on whether New York can justify a preference for a particular description (or "label") *about* an under-

lying pricing structure. Rather, the appropriate inquiry is whether New York can justify its preference for a particular pricing structure in the first instance (i.e., setting credit-card prices at or below the regular price).

3. Contrary to the arguments of some of petitioners' amici (*see, e.g.*, Merchant Br. 5-7, 9-16), Section 518 is not subject to any more heightened scrutiny. The statute is not viewpoint-based because it broadly applies to all retail sales without regard to the seller's identity, its views on merchant fees, or the reason that the seller has decided to impose a credit-card surcharge. *Cf. Sorell v. IMS Health Inc.*, 564 U.S. 552, 569-71 (2011) (concluding that regulation was speaker-based where it allowed only certain speakers to obtain prescriber information).

Although petitioners do not argue that strict scrutiny should apply here (Pet. Br. 36), they nonetheless suggest that Section 518 is viewpoint-based because it restrains a certain "message" that sellers wish to convey—i.e., "informing consumers *why* credit is expensive" (*id.* at 30, 33). But as discussed (*supra* Point I.C.1), the mere imposition of a credit-card surcharge does not convey the seller's purported message because a customer will not know the reason for the surcharge unless it is explained; it is the explanation, and not the surcharge, that delivers the message. Moreover, even if a surcharge could by itself convey a message, Section 518's application does not turn on that message. Sellers could impose a credit-card surcharge for many reasons other than merchant fees—for example, to account for the risk of credit-card users disputing their charges, or to extract additional profits from credit-card users. Section 518 is thus not viewpoint-

based because its application turns only on the fact of a surcharge, not "the specific motivating ideology or the opinion or perspective of the speaker," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

The surcharge prohibition is also not content-based. "Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Here, New York's law applies to sellers' communication of regular or credit-card prices solely because of the relationship between these two prices, and not because of any topic, idea, or message expressed by either price.

To be sure, determining whether the credit-card price is higher than the regular price requires an examination of the numbers that a seller conveys. But a mere numerical price has never been deemed to be the type of "content" whose regulation triggers strict or heightened First Amendment scrutiny. The parties here agree that most price regulations are not subject to First Amendment scrutiny *at all* even though liability under such regulations turns on the numerical prices conveyed by sellers or the "relationships between prices." (Pet. App. 20a; *see* Pet. Br. 34-36; U.S. Br. 14, 16; *supra* Point I.A.) And this Court's development of the commercial-speech doctrine has from the outset recognized that regulation of such speech is "surely permissible" in many circumstances even though numerical prices are often part of commercial messages. *See Va. State Bd.*, 425 U.S. at 770. Applying *Central Hudson* to regulations affecting only the conveyance of numerical prices thus properly reflects the commonsense

understanding that communication about prices, to the extent it is protected by the First Amendment at all, is the quintessential form of "speech proposing a commercial transaction" that is subject to a more deferential standard of review than "other varieties of speech," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

Even if New York's surcharge ban were deemed to turn on the "content" of sellers' communications of their numerical prices, strict scrutiny would not apply. "[C]ontent-based restrictions on protected expression are sometimes permissible, and that principle applies to commercial speech." *Sorrell*, 564 U.S. at 579. In particular, a content-based regulation of commercial speech will satisfy First Amendment scrutiny if it is supported by a "neutral justification," such as advancing "the government's legitimate interest in" preventing "consumer harms." *Id.* Here, as explained further below, the Legislature regulated credit-card surcharges because it determined that the risk of unfair profiteering, abusive sales practices, and consumer confusion that harms the economy "is in its view greater" from credit-card fees. *See id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388-89 (1992)). This neutral justification thus subjects New York's surcharge prohibition to scrutiny under *Central Hudson*, even assuming that the prohibition relies on the content of sellers' price communications.[7]

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[7] Petitioners assert that purported "exemptions" to Section 518 undermine the statute's consumer-protection purposes. (Pet. Br. 40-41.) But the only exemptions here apply to mandatory payments to government entities, such as bail or

(*continues on next page*)

B. The Surcharge Prohibition Directly Advances Substantial State Interests in a Reasonably Tailored Manner.

Under *Central Hudson*, a regulation of commercial speech is valid if it directly advances a substantial state interest that could not "be served as well" by a more limited speech regulation. 447 U.S. at 564; *see Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553-54 (2001). New York's surcharge prohibition satisfies this standard.

1. New York's interest in reducing profiteering.

New York has a substantial interest in preventing sellers from levying excessive or unfair fees on customers. *See, e.g., Griffith*, 218 U.S. at 569. The surcharge prohibition directly advances this interest by eliminating a specific pricing practice that results in sellers gouging credit-card users, without providing any corresponding price reduction to other consumers. Petitioners describe this concern as "hypothetical" (Pet. Br. 39), but both legislative history and real-world experience demonstrate that the risk of such profiteering—to the detriment of overall consumer welfare—is "real," not "mere

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water fees. Gen. Bus. Law § 518. These statutes do not undermine Section 518's goals because credit-card fees imposed by government entities collecting mandatory payments do not threaten the same consumer harms as surcharges imposed by profit-seeking merchants. In any event, these few narrow exceptions for governmental entities do not so pierce Section 518 with exemptions as to fatally undermine New York's consumer-protection interests. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190 (1999).

speculation," *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995).

a. Actual experience in jurisdictions that allow credit-card surcharges confirms that excessive credit-card fees are a genuine concern. *See generally Lorillard*, 533 U.S. at 555 (commercial-speech regulations may be justified based on historical experience). For example, when Australia allowed surcharging, the average credit-card surcharge skyrocketed, despite predictions that competition would prevent that result. *See* Marc Rysman & Julian Wright, The Economics of Payment Cards 13 (Nov. 2012). Sellers in jurisdictions that allow surcharging have likewise reaped excessive fees from credit-card users in sectors where it is difficult for consumers to avoid credit-card use, such as air travel. *See* CHOICE, *supra* at 4, 8, 14; Reserve Bank of Australia, *Review of Card Surcharging: A Consultation Document*, at 5 (June 2011). These real-world examples accord with simple common sense: sellers are profit-seeking businesses rather than consumer advocates. They thus have every incentive to "maximize profits," *FCBA House H'rg*, *supra*, at 6-7, including by setting credit-card surcharges as high as the "market will bear." Ian Lee et al., *Credit Where It's Due* 21 (Oct. 2013); *see also* Jean-Charles Rochet & Jean Tirole, *An Economic Analysis of the Determination of Interchange Fees in Payment Card Systems*, 2 Rev. Network Econ. 69, 76 (2003); *see generally Edenfield v. Fane*, 507 U.S. 761, 771-73 (1993) (government may use "studies," reports, and "literature" in *Central Hudson* analysis).

Petitioners and their amici assume that sellers would collect no more in surcharges than the cost of the merchant fees they pay to credit-card issuers (*see*

Pet. Br. 7; Merchant Br. 19-30; J.A. 42-43), but real-world experience does not support this assumption. Credit-card surcharges in jurisdictions that allow them often exceed the size of the merchant fees. *See, e.g.*, Rysman & Wright, *supra*, at 13; Reserve Bank, *supra*, at 5. And surcharges will more frequently exceed any actual credit-card costs in less competitive markets, or in markets where credit-card use is common and consumers are less able to use cash. *FCBA House H'rg*, *supra*, 6-7; Lee et al., *supra*, at 21; Nicholas Economides & David Henriques, *To Surcharge Or Not To Surcharge?* 30 (ECB Working Paper Series No. 1388 Oct. 2011).

b. When surcharges are allowed, excessive fees to credit-card users are not offset by any corresponding price reduction for other customers. (*See* J.A. 86.) *See* 127 Cong. Rec. 4225 (legislators would be "kidding themselves" to believe that sellers imposing surcharges would start "lowering the general price for everybody"). Petitioners assume otherwise, suggesting that, without the prohibition, sellers would reduce their regular prices and levy excess fees only on credit-card users. (J.A. 42-43, 47.) But this supposition is not supported by real-world experience or economic studies. *See* Allen Rosenfeld, Point-of-Purchase Bank Card Surcharges 7-8 (2010); *Lee*, et al., *supra*, at 22 ("[I]t seems especially unlikely that permitting surcharging of payment card customers will result in lower prices for cash customers.").

Instead, economists have found that sellers maintain their prior regular prices and simply impose new surcharges on credit-card users when such surcharges are allowed—and they do so even when, as petitioners assert here (Pet. Br. 7), their past regular prices ostensibly already included their

credit-card costs (*see* J.A. 42, 46). *See* Wilke Bolt & Sujit Chakravorti, *Economics of Payment Cards*, Econ. Perspectives vol. 32(4), at 19 (2008); Todd J. Zywicki, The Economics of Payment Card Interchange Fees and the Limits of Regulation 45-47 (Geo. Mason Univ. L. & Econ. Research Paper Series No. 10-26 June 2010). For example, when Qantas Airlines implemented credit-card fees, it "did not reduce prices for those paying" with cash or check, "resulting in higher costs for credit card users but no price reduction for others." Lee, et al., *supra*, at 21; *see* 127 Cong. Rec. 4225 ("If the Senator believes that the general price level will go down . . . and that the surcharge will not be just an additional cost to the consumer, then I suggest that he believes in the tooth fairy.").

c. A ban on credit-card surcharges directly advances New York's interest in preventing these consumer harms and "is drawn to achieve that interest," *Sorrell*, 564 U.S. at 572. Indeed, a surcharge prohibition may be the "most direct and perhaps the only effective approach" to prevent profiteering because it directly targets—and prohibits nothing more than—the excessive fees that the Legislature intended to curtail. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981) (plurality op.).

The surcharge prohibition also reduces profiteering without burdening "substantially more speech than" necessary. *See Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 478 (1989) The statute regulates the barest commercial speech—the regular price or the credit-card price conveyed to consumers—without restricting any discussions about credit-cards costs or descriptions of whether credit-card users pay more or

less than cash users. See *supra* Point I.C. Nothing in the surcharge prohibition thus "prevents [sellers] from conveying, or [consumers] from hearing," sellers' opinions about merchant fees. *See Fox*, 492 U.S. at 474.

d. Petitioners assert that the surcharge prohibition does not prevent profiteering because it places no cap on sellers' regular prices, meaning that sellers could theoretically impose the same (high) prices on credit-card customers by inflating the regular price in lieu of a surcharge. (Pet. Br. 41.) But as previously explained, sellers do not in practice simply substitute increases to their regular prices for credit-card surcharges. See *supra* Point I.B.2; *see also* Lee et al., *supra*, at 21; Rosenfeld, *supra*, at 3-4. As a result, requiring sellers to convey credit-card prices that are no higher than their regular prices meaningfully constrains sellers' willingness to exact excess fees from credit-card users.

Petitioners also assert that New York could have achieved its anti-profiteering aim through a "narrower" regulation that prohibited only "excessive" surcharges rather than all surcharges. (Pet. Br. 43.) But this assertion wrongly assumes that New York only has an interest in *limiting* the magnitude of the consumer harm caused by credit-card surcharges, rather than *preventing* any harm altogether.

In any event, a surcharge cap would trench on just as much, if not more, speech than New York's statute. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002). Under petitioners' First Amendment theory (Pet. Br. 39), a three-percent cap on credit-card surcharges would prevent a seller that offers a lawful five-percent cash discount from

"labeling" his discount as a five-percent "surcharge." Petitioners alternatively suggest that New York could address its profiteering concerns by limiting the "difference charged between the credit amount and cash amount" (Pet. Br. 43), but that regulation fares no better because, under petitioners' theory, it would prevent sellers from using surcharges or discounts in excess of that permissible difference to express their views.

2. New York's interest in reducing deceptive and unfair sales tactics.

The surcharge prohibition also directly furthers New York's substantial interest in preventing sellers from engaging in "misleading, deceptive, or aggressive sales practices" that undermine a "fair bargaining process," *44 Liquormart*, 517 U.S. at 501 (plurality op.).

a. When sellers can charge excess credit-card prices above the regular price, there is a risk that they will mislead consumers by posting their regular prices to attract customers and then imposing surprise credit-card surcharges at the register. Commercial experience and congressional testimony demonstrate that such deceptive practices are a genuine concern. *See FCBA House Hr'g*, *supra*, at 8; 127 Cong. Rec. 4219. In New York, for example, consumers have been the victims of such bait-and-switch tactics, particularly from gas stations that lure drivers with a single regular price only to charge more per gallon at the pump for credit-card users. (J.A. 134-138.) And in Australia and the United Kingdom, where surcharges are permitted, sellers have often failed to reveal credit-card surcharges until it is too late for consumers to change their

minds about a purchase, such as when they have already eaten a meal or taken a taxi ride. *See* Office of Fair Trading, Payment surcharges: Response to the Which? super-complaint 6 (July 2012) (*"OFT Response"*); *see id.* at 31-33; CHOICE, *supra*, at 4, 14-15.

Even when sellers disclose credit-card surcharges ahead of time, such disclosures "may not be sufficient . . . to prevent something akin to the troublesome 'bait and switch' technique." *FCBA Senate Hr'g*, *supra*, at 85-86. As economists, consumer advocates, and federal legislators have explained, the unique prominence that consumers give to a seller's regular price in practice leads them to anchor their expectations on that price even when there is some disclosure of a potential surcharge. *See CDA Senate Hr'g*, *supra*, at 18; *OFT Response*, *supra*, at 5-6, 31-33 (explaining importance of "headline price" to consumers); Lee et al., *supra*, at 22. Economists and consumer groups have explained that "merchants recognize" and can take advantage of the powerful role that regular prices play in retail transactions by setting and conveying lower regular prices—a tactic that will in practice lure customers even when a merchant also discloses that a surcharge may later apply. Lee et al., *supra*, at 22; *see also OFT Response*, *supra*, at 28 (explaining that sellers use surcharging as a "deliberate strategy" to make prices less transparent even when there is some disclosure of a surcharge).

b. Contrary to petitioners' assertions (Pet. Br. 39-40), discounting is not as likely as surcharging to incentivize merchants to exploit consumers through "hidden costs" and thus does not undermine the reasonableness of Section 518. Put simply, sellers

have little incentive to hide discounts; to the contrary, sellers have every reason to broadcast discounts early and clearly to "bring consumers into the store." *CDA Senate Hr'g*, *supra*, at 27. Cash discounts thus create a "more transparent" and "consumer-friendly dynamic" than credit-card surcharges do. Lee et al., *supra*, at 22.

The surcharge prohibition's consumer-protection goals are also not undercut by the statute's application to credit-card surcharges but not to other charges. *See* Pet. Br. 41. States are entitled to make "legislative judgments" about which fees are more likely to motivate sellers to abuse consumers. *See United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993).

Section 518 does not fail to advance New York's goals simply because other state statutes also protect consumers. Different statutes are "fully capable of coexisting" and serving important government interests even though they may overlap. *United States v. Batchelder*, 442 U.S. 114, 122 (1979). In any event, the false advertising and anti-deception statutes petitioners rely on are not coextensive with the surcharge prohibition. (*See* Pet. Br. 42.) While these laws prohibit outright fraud and misleading conduct, they do not necessarily address more subtle but still harmful practices that exploit consumers' tendency to anchor their expectations on regular prices—such as a last-minute disclosure of a credit-card surcharge before a sale is finalized. Moreover, Section 518 imposes different penalties—including criminal sanctions—that the anti-deception and false-advertising statutes do not authorize. *Compare* GBL § 518, *with id.* §§ 349(b), 349(d), 350-d. The First Amendment does not bar New York from

"deciding that the civil penalties" and provisions of other statutes "were not enough to address the problem" of credit-card surcharges. *See Dana's R.R.*, 807 F.3d at 1256 (Carnes, C.J., dissenting).

3. New York's interest in stimulating its retail economy.

The surcharge ban also directly furthers New York's interest in protecting its economy. First, Section 518 encourages greater uniformity in the pricing schemes that sellers adopt, enabling consumers to easily compare prices and avoiding consumer confusion from facing "different types of pricing systems from one store to the next." *FCBA Senate Hr'g*, *supra*, at 8; *see FCBA House Hr'g*, *supra*, at 8 ("Consumers should not have to endure the confusion which would result from a wide variety of methods of advertising the price of an item."); CHOICE, *supra*, at 31 (explaining concerns "about surcharging making consumers more 'captive'" because of difficulties comparing prices). Indeed, many sellers that objected to one of the private antitrust settlements recognized that credit-card surcharging harms consumers because surcharges "encourage consumer confusion [and] taint shopper experience." Objection of Foot Locker, Inc. ¶ 19, *Interchange Fee*, 2013 WL 6510737 (No. 05-MD-1720); *see* Objection of Darden Restaurants, Inc. ¶¶ 11-12, *Interchange Fee*, 2013 WL 6510737 (No. 05-MD-1720, ECF No. 2587) (customers "find surcharging confusing" and often "have no option to 'return'" a product if surcharge is "unacceptable"); Decl. of Brooks Brothers Group, Inc. ¶ 5, *In re Antitrust Litig.*, 2013 WL 6510737 (No. 05-MD-1720, ECF No. 2538-4) ("[s]urcharging is not customer

friendly" and consumers "would vociferously question the practice").

Second, the surcharge prohibition prevents a practice that may deter credit-card use and thereby reduce the use of a payment method that provides many efficiencies and benefits to consumers, sellers, and the economy as a whole. A substantial body of economic literature establishes that credit cards are less expensive and more efficient than cash or checks once the benefits of credit-card systems are taken into account. *See, e.g.*, James McAndrews & Zhu Wang, *The Economics of Two-Sided Payment Card Markets* 5-6, 25-26 (Fed. Reserve Bank of Richmond Working Paper 12-06 2012); Zywicki, *supra*, at 7-26; *see also* 127 Cong. Rec. 4219. Credit-card surcharges can thus discourage the use of an efficient and useful payment platform. *See* Lee et al., *supra*, at 24-25.

Petitioners assert that these economic interests are illegitimate because New York seeks to achieve them by "blindfold[ing]" the public and maintaining "consumer ignorance." (Pet. Br. 38.) But this argument wrongly assumes that the surcharge prohibition affects consumer behavior by blocking information supposedly conveyed through extra charges or price reductions. (*See* Pet. Br. 38.) For the reasons explained, the statute does not limit any such information. See *supra* Point I.C.

C. Section 518 May Also Be Upheld as a Valid Consumer-Disclosure Law.

The United States explains that the prior federal surcharge prohibition was a valid consumer-disclosure law under *Zauderer*, and suggests that a remand is necessary to determine whether New York's law can

be upheld on that ground as well. (U.S. Br. 21-33.) Remand is unnecessary here. For purposes of a *Zauderer* inquiry, New York's law parallels the prior federal surcharge prohibition in all relevant respects, and there is no jurisdictional barrier to this Court relying on *Zauderer* to affirm the decision below on this alternative ground.

1. As the United States explains, the federal surcharge prohibition ensured that consumers would be "adequately informed" of the highest price "in dollars and cents" that a seller would charge on account of credit-card use. (U.S. Br. 23, 26.) New York's surcharge prohibition likewise guarantees that consumers will be exposed to the highest price that they could be charged for using a credit card, although it achieves that result through the ordinary meaning of the term "surcharge" (as an increase above the regular price) rather than through express definitions. As under the federal statute, a seller that has a single "tagged or posted" price can comply with New York's law by charging no more than that price for credit-card customers. And as under the federal statute, a seller that has no single regular price can comply with New York's law by disclosing a dollars-and-cents price for credit-card users. See *supra* Point I.B.1.c.

The purpose and legislative history of New York's surcharge prohibition further confirm that New York's law was intended to parallel the prior federal surcharge ban. As explained (see *supra* at 12-13), New York's Legislature enacted the surcharge prohibition and modeled it on the federal law to continue the same consumer-protection policies as Congress had pursued—including protecting consumers from the misleading prices that they

would face if a seller posted a single regular price and only later imposed an additional surcharge for customers using credit cards. (U.S. Br. 8-9, 23-24, 28.) Accordingly, for the reasons set forth by the United States, the prior federal statute can be understood as a constitutional disclosure requirement under *Zauderer*, and New York's law is a valid disclosure requirement for the same reason.

2. To be sure, as the United States observes (U.S. Br. 33), the parties did not specifically address the application of *Zauderer* in the circuit. The court of appeals had no occasion to pass on this issue in any event, because it concluded as a threshold matter that New York's surcharge prohibition was not speech subject to the First Amendment at all. (Pet. App. 18a-19a & n.7.)

This Court may nonetheless address the question and affirm the decision below on the alternative ground that, if Section 518 is deemed to be a speech regulation, it survives scrutiny as a permissible disclosure requirement for the reasons given by the United States with respect to the parallel federal surcharge prohibition. There is no jurisdictional bar to affirming the decision below on alternative grounds. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 476 n.6 (1970). The application of *Zauderer* is a pure legal question that does not rely on any additional factual or procedural developments. And although the parties did not rely on *Zauderer* in the circuit, they fully briefed and presented to the courts below the same legislative concerns about consumer deception and confusion that satisfy both *Zauderer*'s disclosure rule and *Central Hudson*'s commercial-speech test. There is thus no barrier to affirmance based on *Zauderer*.

III. The Surcharge Prohibition Is Not Unconstitutionally Vague

All that due process requires is that ordinary people applying common sense can understand what conduct Section 518 prohibits. *See United States v. Williams*, 553 U.S. 285, 304 (2008). Petitioners assert that Section 518 is unconstitutionally vague because it is impossible to distinguish between a permissible "discount" and an impermissible "surcharge" under the statute. (Pet. Br. 26.) But both the "everyday understanding" and "regular usage" of these terms, *Lopez v. Gonzales*, 549 U.S. 47, 53-54 (2006), provide sufficient clarity to satisfy due process: a surcharge is an addition to a seller's regular price, while discounts are a reduction from that price.

This familiar distinction between surcharge and discount is more than enough "to provide a person of ordinary intelligence fair notice of what is prohibited." *Williams*, 553 U.S. at 304. In the vast majority of retail transactions, a seller's regular price is "readily ascertainable" (Pet. App. 15a), and it would be obvious whether a deviation from that price is a surcharge or a discount. See *supra* Point I.A, I.B.1 (explaining difference). By contrast, if a seller has no regular price, then Section 518 does not apply. See *supra* Point I.B.1.c. Due process is thus satisfied.[8]

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[8] Petitioners are wrong to assert (Pet. Br. 46-47) that the Attorney General has altered his interpretation of Section 518 during the course of this litigation. The Attorney General has consistently maintained that the statute prohibits only the conduct of imposing a surcharge rather than speech. (Dist. Ct. Dkt. No. 27, at 36-37; Pet. App. 18a-19a, 73a). In addition, as

(*continues on next page*)

As with their First Amendment claim, petitioners stake their vagueness challenge on abstract pricing schemes constructed to avoid the commercial reality of regular prices. (*See* Pet. Br. 49-50.) But "speculation about possible vagueness in hypothetical situations" cannot sustain a due process vagueness claim, particularly in this preenforcement challenge.[9] *Hill v. Colorado*, 530 U.S. 703, 733 (2000). Moreover, a statute is not vague simply because it may be difficult to apply at the margins. "Close cases can be imagined under virtually any statute." *Williams*, 553 U.S. at 306. Such borderline cases are "addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Id.*

The only reported criminal prosecution under Section 518 is best understood as a failure by the prosecution to satisfy this proof requirement. In that prosecution, the trial court had initially rejected a pretrial vagueness challenge to Section 518, holding that the statutory term "surcharge" could be readily understood according to its "everyday, commonsense meaning," *People v. Fulvio*, 135 Misc. 2d 93, 95 (N.Y.

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any responsible litigant would, the Attorney General has presented alternative legal arguments to defend the statute if the courts were to conclude that the surcharge prohibition does implicate protected speech. Contrary to petitioners' assertions, these arguments are not inconsistent interpretations of Section 518, but rather alternative justifications for the statute under different legal doctrines. These arguments do not remotely suggest that the statute is unconstitutionally vague.

[9] Petitioners' invocation of the First Amendment (Pet. Br. 44) does not support their reliance on such hypotheticals because a First Amendment overbreadth claim is not available for regulations of commercial speech. *See Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-97.

Crim. Ct. 1987). But after the defendant (a gas station operator) was convicted of violating the statute, the court set aside the conviction. While the court purported to find the statute itself unconstitutionally vague, its discussion of the "facts proved at trial" demonstrates that the actual problem was the prosecution's inability to establish the defendant's regular gas prices beyond a reasonable doubt—an essential predicate to proving that the defendant had illegally exceeded that baseline. *People v. Fulvio*, 136 Misc. 2d 334, 338-39 (N.Y. Crim. Ct. 1987). In particular, the court noted that there was conflicting evidence about "whether [signs] clearly set forth 'credit' prices and 'cash' prices," and that an employee had "interchangeabl[y]" communicated the credit-card price as "five cents 'extra'" and the cash price as a "nickel less." *Id.* at 339, 342.

Fulvio thus demonstrates, at most, that a prosecutor may not satisfy Section 518's evidentiary requirements in a particular case. Contrary to petitioners' argument, the failure of one criminal prosecution does not render the statute impermissibly vague in every instance. Because Section 518's prohibition against the imposition of credit-card surcharges is clear "in the vast majority of" cases, *Hill*, 530 U.S. at 733, the statute is sufficiently clear to satisfy due process.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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